No. 6125

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

C. I. T. CORPORATION, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

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Subject Index

Authorities Cited or Discussed

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(NOTE: All italicizing is Appellant's. P. R. p....., indicates the page of the Printed Record.)

STATEMENT.

This is an appeal from a judgment forfeiting to the Government one certain Graham Truck, for being in a "yard or enclosure" in which said yard or enclosure (it is alleged) there was also found certain

named "contraband", which said "contraband" (it is alleged) was then and there possessed and concealed with intent *to defraud the revenue* by evading the payment of the tax.

Pleadings.

The Libel (P. R. p. 4) alleges that the truck was seized by one Joseph R. Sheean who is stated in said libel to have been

> "a duly appointed and acting *Agent of the Bureau of Prohibition of the U. S.",*

and that said truck was found by said Sheean

> "in the yard and enclosure of premises known as McGregory Ranch, four miles south of Westgate, Yolo County, California",

and that in said yard and enclosure there was also found

> "the following *articles and raw materials,* to-wit one 350 gallon alcohol still complete, 10,000 gallons of mash, 150 gallons of Jack Ass Brandy, 36 sacks of corn sugar",

and that said articles and raw materials were

> "designed and possessed for the purpose and with the intent to manufacture liquors of a kind subject to tax and upon which there was then and there due and imposed certain taxes to the U. S. of America",

and that

> "the said taxes had not been paid and the said *articles and raw materials* were possessed and

concealed in said yard and enclosure *with intent to defraud* the U. S. of said taxes",

and that said possession and concealment were

"in violation of *Section 3450, R. S. U. S.*".

Demurrer, Claim and Answer (P. R. p. 7).

The C. I. T. Corporation (appellant herein) appeared and filed herein (in one paper) its Demurrer, Claim and Answer. The *Demurrer* was on the ground that the libel did not state facts sufficient to constitute a cause of action or forfeiture: the *Answer* set forth ownership by said C. I. T. Corporation of the truck in question, and denied (for lack of information) the material allegations of the libel, and asserted the claimant's innocence of any wrong doing and/or inculpatory knowledge on its part. The Demurrer was overruled.

Trial.

The case came on to be tried on the Libel and Answer, before the court without a jury—jury trial having been duly waived.

At the commencement of the trial, claimant objected to the introduction of any evidence; on the ground that the Libel did not state a cause of action or forfeiture. This objection was overruled, and evidence was heard and the cause submitted. At a reasonable time before judgment, the claimant requested the court to make Findings of Fact and Conclusions of Law and also to make certain enumerated Special

Findings of Fact and Conclusions of Law; but the court refused all such requests and rendered *Judgment of Forfeiture, without having made any findings whatsoever.*

There was *no evidence* that Mr. Sheean (who made the seizure) was a "Collector or Deputy Collector", or was a person who had been "specially authorized by the Commissioner of Internal Revenue" to make seizures; *no evidence* that the "articles and raw materials" were possessed or concealed with any *intent to defraud the revenue; no evidence* that the truck was found within the "yard or enclosure"—the evidence on that point being that said truck was *partly within* and *partly without* the enclosure—(the front wheels being within and the rear wheels being without, the enclosure); *and the evidence showed* the C. I. T. Corporation to be the owner of the truck and that it had parted with its possession to one Louis Belli under a Conditional Bill of Sale and that they had no connivance in, or knowledge of, any (or of any contemplated) unlawful use or design; and *there was no evidence* that either C. I. T. Corporation or said Louis Belli had any connection whatsoever with any of the persons in whose immediate possession said truck or said articles or raw materials were found when seized by Mr. Sheean.

STATEMENT OF QUESTIONS INVOLVED IN THIS APPEAL AND OF THE MANNER IN WHICH SAID QUESTIONS WERE RAISED.

A statement of these matters appears in the headings of I, II, III, IV, V, VI of Points, Argument and Authorities, infra p. 5, et seq.

POINTS, ARGUMENT AND AUTHORITIES.

I and II

(considered together, because cognate).

(I) THE COURT ERRED IN OVERRULING THE DEMURRER.

The question arose on the demurrer (see Answer, P. R. p. 7) on the order overruling same (see Order-entry, P. R. p. 3) Assignment of Errors No. 1 (P. R. p. 19).

(II) THE COURT ERRED IN OVERRULING CLAIMANT'S OBJECTION TO THE INTRODUCTION OF EVIDENCE.

The question arose on the objection as made at the commencement of the trial (Bill of Exceptions, P. R. p. 11); on the ruling as made (Bill of Exceptions, P. R. p. 11), Assignment of Error No. II (P. R. p. 20).

Discussion.

(I) *The Demurrer:*

The Libel alleges in paragraphs II, III and IV:

"that the said articles and raw materials were designed and possessed with intent to manufacture

intoxicating liquors of a kind subject to tax and upon which there was then and there due and imposed certain taxes to the United States of America: that 'said taxes had not been paid, and the said articles and raw materials were possessed and concealed in said yard and inclosure with intent to defraud the United States of said taxes; that the said possession and concealment of the said articles and raw materials was *in violation of the provisions of section 3450 of the Revised Statutes of the United* and the said automobile, its tools and appurtenances are subject to condemnation, forfeiture and sale."

Said Section 3450, R. S. U. S., is Section 1181, Title 26, U. S. C. A.; and is as follows:

> "Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed * * * are removed or are deposited or concealed in any place with intent to defraud the U. S. of said tax or any part thereof, all such goods or commodities and all such materials, utensils and vessels, respectively, shall be forfeited; *and in every such case* * * * every vessel, boat, car, carriage or other conveyance whatsoever, and all horses or other animals *used in* the removal or the deposit or concealment thereof shall be forfeited."

The only allegation in the Libel which even hints at any "delinquency" on the part of the truck is the allegation in paragraph I (P. R. p. 4) that the truck was found

> "in the yard and enclosure of premises known as the McGregory Ranch four miles south of Westgate, Yolo County, California—in which said yard was also found the following articles and raw materials to-wit: one 350 gallon alcohol still—10,000 gallons mash—150 gallons jack ass brandy —36 sacks corn sugar."

It is manifest that the Libel does not state facts sufficient to authorize a forfeiture of the truck *under Section 3450, R. S. U. S.;* for the reason that there is no allegation of any connection whatsoever of the truck with the alleged contraband articles or with the alleged fraudulent intent—no allegation that the truck was used in the alleged deposit, removal or concealment—nothing except that the truck was found in the yard, or enclosure—(with not even an allegation of proximity). Claimant demurred on that ground: the demurrer was overruled; for the reason, we presume, that the court considered the Libel to be good under Section 3453, R. S. U. S., as that is the only section using the words "within the yard or enclosure".

Said Section 3453, R. S. U. S., is Section 1185, Title 26, U. S. C. A. and reads as follows, to-wit:

> "All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal-revenue laws, or with design to avoid payment of said taxes, may be seized *by the collector or deputy collector of the proper district, or by such*

other collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and shall be forfeited to the United States. And all raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and all tools, implements, instruments, and personal property whatsoever, in the place or building, *or within any yard or inclosure where such articles or raw materials are found,* may also be seized *by any collector or deputy collector, as aforesaid,* and shall be forfeited as aforesaid. The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the district court of the United States for the district where such seizure is made."

This brings us to a consideration of

(II) *The Objection to the Introduction of Evidence:*

Granting, for the sake of the argument only, that the allegation in the Libel of a *violation of Section 3450, R. S. U. S.,* is mere surplusage and that it was right to overrule the Demurrer and the Objection, *provided* the Libel stated a cause of forfeiture under *any* Statute; still claimant maintains that the Libel is insufficient even under Section 3453, R. S. U. S.

Said Section 3453, R. S. U. S., is a very drastic statute—a very dangerous and oppressive statute; so much so that forfeitures on the ground only that the

seized object was found "within the yard or enclosure" where the "contraband" articles were found, have not often been adjudged by the courts.

Analyzing the section, as was done in *In re Hurley,* infra, it will be seen, we think, that the words "tools, implements, instruments and other personal property whatsoever in the place or building or within any yard or inclosure where such articles or raw materials are found may also be seized" have no reference whatsoever to the "finished product" (in the instant case, the 150 gallons of jack ass brandy) but only "to the places where the contraband article is *being fabricated"* (37 Fed. (2) p. 399—1st col. bottom). As early as 1867 it was held that:

> "The information should aver the fact that the tools, implements, and other personal property were found in the place or building or within the yard or enclosure *where they were intended to be used."*
>
> *U. S. v. Sixteen Hogsheads,* F. C. 16302; also F. C. 15948.

There is not in this Libel any allegation whatsoever that the seized truck was so found, or even that the raw materials were to be *there* manufactured into "contraband".

Construing the words "other personal property" as used in this statute Judge Lowell of the U. W. District Court of Mass. in *U. S. v. 33 Bbls.,* 23 F. C. 72, said:

> "* * * and upon a literal interpretation (the statute) might seem to subject to seizure and for-

feiture all goods and chattels and other things coming within the general description of personal property, to whomsoever they may belong if found in the same * * * yard, etc. with the offending goods. *It is impossible to believe* that any such sweeping condemnation is intended to be passed founded upon mere proximity in place upon the goods of all persons innocent or guilty—(2d Col. p. 73).

* * * * * * *

It is a rule of law as well as of natural justice that statutes will not be understood to forfeit property except for the fault of the owner or his agents general or special, unless such a construction is unavoidable (idem) citing

* * * * * * *

By reason and analogy, as well as by the context, we find that some real connection with the fraud is intended to be attached to the property that is liable to seizure. The taxed articles and the raw materials intended to be manufactured are the principal things, and the tools, implements, instruments and personal property are only the connected incidents. *I am of the opinion that by the familiar rule of construction, called noscitur a sociis, we must restrict the general words, personal property, by the more particular and immediately preceding words, tools, implements and instruments"* (idem. p. 73 bottom 2nd Col., top 1st Col. p. 74).

III.

THE COURT ERRED IN RENDERING JUDGMENT OF FORFEITURE WITHOUT HAVING MADE ANY FINDINGS OF FACT.

This question arose on Paragraph I of Request for Findings (see Bill of Exceptions, P. R. p. 15) Assignment of Errors No. X (P. R. p. 22).

Discussion.

A proceeding for forfeiture of property seized on land is a civil action at law to be tried as such.

Greer Robbins v. U. S., 19 Fed. (2d) 841; (9th C. C. A. 1927);

Nat. Surety Co. v. U. S., 17 Fed. (2) 372 (9th C. C. A. 1927).

In civil actions there must be a Finding of Facts—"either general or special to authorize a judgment and that finding must appear in the record".

Aetna v. Boon, 95 U. S. 117, 124 middle; 24 L. Ed. 395.

In the case at bar we have a judgment in a civil action at law (tried by the court) unsupported by *any* Finding of Fact—either general or special; and therefore it must be that the judgment cannot stand.

Claimant requested the court to make Findings and also requested the court to make certain enumerated special Findings of Fact and certain Conclusions of Law, and all of said Requests for Findings were refused by the court and said refusals were duly excepted to and duly assigned as error. This court,

then, will review the evidence (brought up by the Bill of Exceptions) for the purpose of determining its sufficiency.

Societe Nouvelle v. Barnaby, 246 Fed. 68, 71 (9th C. C. A. 1915).

The particulars wherein the evidence is thought to be insufficient are stated and discussed in IV, V and VI, infra—viz.:

IV.

THE COURT ERRED IN ADJUDGING A FORFEITURE OF THE TRUCK; BECAUSE THE EVIDENCE SHOWED THAT THE PERSON WHO MADE THE SEIZURE WAS NOT A "COLLECTOR OR DEPUTY COLLECTOR" OR ONE WHO HAD BEEN SPECIALLY AUTHORIZED BY THE COMMISSIONER OF INTERNAL REVENUE TO MAKE SEIZURE.

The question arose on the Libel and Demurrer and on the Evidence (Bill of Exceptions, Trp. p. 12), Request No. IX for Special Findings (Bill of Exceptions, P. R. p. 17), Assignment of Error No. VIII (P. R. p. 22).

Discussion.

At the beginning we wish to accentuate the fact that this is not a proceeding under the National Prohibition Act: on the contrary it is one under the Internal Revenue Act—Section 3453, R. S. U. S.

The Libel states, and the evidence shows, that the truck was not seized by any officer authorized to make a seizure under Section 3453 of the R. S. U. S. Sheean

is said to have been a Federal Prohibition Officer: it is not charged or shown that he was a "Collector" or "Deputy Collector" of "Internal Revenue" or "any person specially authorized by the Commissioner of Internal Revenue for that purpose"; and yet under said Section 3453 only such persons may make the seizure. We think this is manifest from an inspection of said Section 3453 and of preceding sections, viz.:

Section 3163, R. S. U. S. (Sec. 34, Title 26, U. S. C. A.), provides:

> "*Every collector* within his collection-district and *every internal revenue* agent shall see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto."

Section 3166, R. S. U. S. (Sec. 61, Title 26, U. S. C. A.), provides:

> "Any officer of internal revenue may be specially authorized by the Commissioner of Internal Revenue to seize any property, which may by law be subject to seizure, and for that purpose such officer shall have all the power conferred by law upon collectors; and *such special authority shall be limited in respect of time, place, and kind and class of property, as the Commissioner may specify;* Provided, That no collector shall be detailed or authorized to discharge any duty imposed by law upon any other collector."

Section 3453, R. S. U. S. (Sec. 1185, Title 26, U. S. C. A.), provides:

> "All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal-revenue laws, or with design to avoid payment of said taxes, may be seized *by the collector or deputy collector* of the proper district, or by such other *collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose,* and shall be forfeited to the United States. And all raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and all tools, implements, instruments, *and personal property whatsoever,* in the place or building, *or within any yard or inclosure where such articles or raw materials are found,* may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited as aforesaid. The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the circuit court or district court of the United States for the district where such seizure is made."

It is thought that these sections of the Revenue Statutes clearly show that congress meant to limit to the officers named the "authority to seize" for simply being "in the yard or enclosure". It is conceded

that if this were a proceeding under the common law anybody's seizure would be good; if it were a proceeding under R. S. U. S., Section 3450, the seizure would be good; because in said section no officers are named to make the seizure. But it is not a proceeding under either the common law or under R. S. U. S., Section 3450: on the contrary, it is a proceeding under R. S. U. S., Section 3453—a far more drastic statute than Section 3450—(e. g., Section 3450 provides that all horses, carriages, etc. "*used* in the removal or for the deposit, etc., shall be forfeited"; *and* contains *no* mention of seizure and *contains no specification of the officer who is to make the seizure:* but Section 3453 goes further, by providing that "all tools, implements, instruments, and personal property whatsoever in the place or building, *or within any yard or enclosure where such articles or* raw materials are found *"may also be seized by any collector or deputy collector as aforesaid* and shall be forfeited as aforesaid").

Expressio unius, alterius exclusio; and especially so in a statute as drastic as Section 3453—a statute which on its face, seems to allow the forfeiture of the property of a person who may be entirely innocent of any wrong doing—property of which all that is said by the Libel or shown by the evidence here, is that it was "found within the yard or enclosure". By the fact of expressly naming in Section 3453 the officers who may make seizure under said section, it is to be inferred that no other officers or persons are so authorized—else why mention specific officers?

Why not "silence" on that subject? Section 3450 maintains silence on that subject; is there no significance in the fact that in the more drastic statute (viz.: Sec. 3453) that silence is broken?

In *United States v. Loomis,* 297 Fed. 360, the C. C. A. of the 9th Circuit said:

> "The general rule is that a statute whereby a man may be deprived of his personal property by way of a punishment should be construed with strictness; hence those who assume authority to take possession of such property should have clear warrant for their action." (Report p. 360.)

and

> "But in a direct proceeding, testing whether the automobile was liable to be seized by the police authorities, the lawfulness of the seizure will be inquired into. Forfeiture can only be declared if the thing sought to be forfeited was lawfully taken into possession."

This case was followed in *U. S. v. Certain Malt,* 23 Fed. (2) 879.

It will doubtless be contended that other decisions are to the effect that "anybody" can make a seizure, and that the government adopts the seizure by seeking enforcement of the forfeiture. We review (infra) the leading cases so holding, and show, we think, that they are not applicable to a proceeding under Section 3453, for the reason that said section specifically names the officers who may make seizures under that section, and such enumeration excludes all others.

In *U. S. v. One Reo Motor Truck,* 6 Fed. 2nd 412 (D. C. of R. I.), June, 1925, it is said—speaking of a seizure under a statute specifying the seizing officers but where the seizure was made by officers not specified—

> "In the absence of such provisions, it seems to me they are not included."

Review of Some Cases.

Hoyt v. Gelston, 3 Wheat 247; U. S. S. C., Feb., 1918.

This case is the fountain head, from which, in this country at least, are derived those authorities which hold that the seizure may be made by any one. The case involved the seizure of a ship then being fitted out and about to sail for the purpose of committing hostilities upon a foreign country with which the U. S. was at peace. The vessel was seized by the Collector of Customs at N. Y. Trespass was brought against the Collector and that official pleaded justification under the Statute and the President's orders. As to whether or not the Collector of Customs had authority to make the seizure the court said:

> "* * * *At common law,* any person may, at his peril, seize for a forfeiture, to the government; and if the government adopt his seizure, and the property is condemned, he will be completely justified. And it is not necessary, to sustain the seizure or justify the condemnation, that the party seizing shall be entitled to any part of the forfeiture, * * * And if the party be en-

> titled to any part of the forfeiture, * * * there can be no doubt, that he is entitled in that character to seize (Roberts v. Witherhead, 12 Mod. 92). *In the absence of all positive authority,* it might be proper to resort to these principles, in aid of the manifest purposes of the law. But there are express statuteable provisions, which directly apply to the present case."

and

> "* * * the case falls within the *broader language of the act of the 19th of February, 1793,* Ch. 8, s. 27, which authorizes the officers of the revenue to make seizure of any ship or goods, where any breach of the laws of the United States has been committed. Upon the general principle then, which has been above stated, and *upon the express enactment* of the statute, the defendants, supposing there to have been an actual forfeiture, might justify themselves in the seizure." (Report p. 259.)

From the above excerpts, it is apparent that the decision rests upon the statute and that whatever is said as to the common law is dicta: and whether that dicta be correct or incorrect as a statement of the common law, the decision can have no controlling weight here; because the validity of this seizure depends upon neither the common law nor upon a statute similar to the statute in that case. On the contrary said Section 3453 is radically different from any other.

The Caledonian, 4 Wheat. 100; U. S. S. C., Feb., 1819.

This case involved the right of a Collector of Customs to seize the enemy's ship as prize of war. The court merely said:

> "* * * any person may seize any property forfeited to the use of the government, either by the municipal law or the law of prize, for the purpose of enforcing the forfeiture. And it depends upon the government itself whether it will act upon the seizure. If it adopts the act of the party, and proceeds to enforce the forfeiture by legal process, this is a sufficient recognition and confirmation of the seizure and is of equal validity in law, with an original authority to the party to make the seizure." (Report p. 320.)

This is general language and must not be given application except in relation to the matter then before the court. There was not before the court any statute at all—least of all any statute at all similar to Section 3453, R. S. U. S. The court was simply administering the law of "prize".

Wood v. U. S., 16 Pet. 342; U. S. S. C., January, 1842.

This was a libel for forfeiture of certain imported goods which had not been invoiced at the place of exportation. It does not appear just what was the language of the violated Act (but see next

case infra), but the language of the court was this, to-wit:

> "*Under these Acts,* the enforcement of the forfeiture is not dependent upon the manner in which the goods may happen to have been seized, or the reasons for the seizure which may happen to have been known or to have been assigned at the time of *making* it."

Here again the language is general, and the court had before it no such statute as is said Section 3453.

Taylor v. U. S., 3 How. 197; U. S. S. C., January, 1845.

This too was a seizure of goods for illegal importation, and the point was made by claimant that the seizure should have been made by the Collector of Customs of New York instead of by the Collector at Philadelphia. The point was held to be not well taken—the court saying that:

> "* * * *the 70th section of the same act makes* it the duty of the several officers of the customs to make seizure of all vessels and goods liable to seizure by virtue of that act or of any other act respecting the revenue—as well within as without their respective districts." (Report p. 205.) (Italics ours.)

There was not before the court any such statute as Section 3453.

U. S. v. 508 Bbls., F. C. No. 15113; D. C. of N. Y., June 10, 1867.

Seizure *not* under Section 3453. The court said:

"Any person may make the seizure, as in the case of seizures under the customs, as the direction in *this statute* is no more specific than is the direction in *that one as to an officer of customs being required to make the seizure.*" (Report p. 1098, 1st Col.) (Italics ours.)

From this language it is to be inferred that "if *this statute*" was "specific as to the officer" to make seizure the holding would not have been as it was. Now—in the case at bar—Section 3453 is *specific* in that regard.

U. S. v. One Studebaker, 4 Fed. (2) 534; C. C. A. (9th), Mch., 1925.

Relates *only* to Section 3450.

The Sagatind, 4 Fed. (2d) 928; D. C. of N. Y., April, 1925.

Relates *only to Section 3450.*

U. S. v. One Ford, 272 U. S. 321, 71 L. Ed. 279, 283, 1st Col.; U. S. S. C., Nov., 1926.

Relates *only to Section 3450.*

We think this list includes all cases usually relied upon. From an inspection of them it will be seen that none of them construes said Section 3453. They have application where the statute does not name the officers to make the seizure.

The general language in some of those decisions to the effect that the government may *adopt* a seizure is not to be read out of its context. It has been said:

> "The language of any decision must be construed and understood as applying to the fact before it, and *where there is a legal right to seize but no formal authority, the Government may adopt the seizure—otherwise not.*"
>
> *U. S. v. Certain Malt,* 23 Fed. (2) 879.

V.

THE COURT ERRED IN ADJUDGING A FORFEITURE OF THE TRUCK TO HAVE BEEN INCURRED; BECAUSE THERE WAS NO EVIDENCE OF AN INTENT TO DEFRAUD THE REVENUE.

The question arose on the evidence (Bill of Exceptions, P. R. pp. 12, 13, 14). Request for and refusal to make Finding No. VI (Bill of Exceptions, P. R. p. 16) Assignment of Error No. VI (P. R. p. 21).

Discussion.

In view of *United States v. One Ford Coupe* (272 U. S. 321, 71 L. Ed. 279, Nov. 22, 1926), it would of course, be idle to contend that either Section 3450 or Section 3453 was *repealed* by the enactment of the

National Prohibition Act. *In that case, however, the court had before it the bare question of repeal or non-repeal,* for the question arose in the consideration of a motion to quash the information—virtually a demurrer; no facts—no proof—was dealt with, and the court was careful to say that:

> "*If intent to defraud* the United States *of the tax is established* by any competent evidence", etc. (71 L. Ed. p. 285, 1 Col.),

and what, under present conditions, constitutes proof of said intent was not touched upon, because "not before the court".

Now when it comes to the *question of intent* (and the *proof of intent*) to defraud the government of a tax; the fact that there is no way of paying a tax, and that the government would not accept tax money if it should be offered, negatives the existence of any intent to evade the payment of the tax. It seems to the writer to be incongruous for anyone, in these days, to contend that any maker of "moonshine" could possibly be actuated by, or could have, the intent to defraud the government of something which the government would not and could not, under any circumstances, accept—which it would be unlawful for any officer of the government to receive. In the days when it was possible to pay the tax, the burden was on the possessor to show that the tax had been paid or that it would be paid, etc., or that there was no intent to evade the payment of the tax; but in those days all whiskey was taxed or taxable. No such

presumption can prevail in these latter days—days in which only some whiskey is taxable—days when there is no possibility of the government accepting a tax on the whiskey in question here. In these days the zealous prohibition officers seize the "contraband", not with any design of collecting a tax thereon—not for the purpose of swelling the revenue nor of aiding in the enforcement of the Revenue Laws; nor does any such seizure accomplish (or aid in the accomplishment of) any such purpose. When, however, "contraband" is seizable under Revenue Acts it must be found in the possession, custody or control of some person whose purpose in having such possession and control is to hold, sell or remove that "contraband" in fraud of the Internal Revenue Laws and with the design to avoid payment of said taxes. How can a person have a "purpose to sell or remove" an article *"in fraud of the Internal Revenue Laws"* unless he knows, or at least thinks, that said selling or removal will defraud the revenue? How can such person do a thing with a design "to avoid the payment of said taxes" unless he knows, or at least thinks, that if he does do that thing he *will* avoid the payment of said taxes? and how could such person know or think *that*, when he must know that the government would not and could not receive *any such tax-money* if it were offered?

It is of course true that (ordinarily) a person will be presumed to intend the "natural and probable consequences of his act", but how can it be said that

"the natural and probable consequences" of the acts of the possessors of the contraband in question here, was an avoidance of the payment of a tax? Besides the said presumption does not obtain in those cases where the possession or action complained of is not interdicted by the statute *unless it is accompanied by the certain specific intent* stated in the statute (16 C. J., p. 83, Sec. 50).

This contention of "no proof of intent", "bottomed" as (we think) it is on common sense, is supported by abundant authority and we cite the following cases and rely upon them, *inter alios,* viz.:

U. S. v. One ton Wichita, 37 Fed. (2) 617 (D. C. of N. Y., 1930);

U. S. v. One Dodge Coupe, 34 Fed. (2) 943 (1929, D. C. of Mass.);

U. S. v. One Chevrolet, 21 Fed. (2) 477 (1927, D. C. of Ala.);

U. S. v. One Chevrolet, 25 Fed. (2) 238 (1928, C. C. of A., 5th);

U. S. v. One 5 ton Truck, 25 Fed. (2) 788 (1928, C. C. of A., 3rd);

U. S. v. One Buick, 34 Fed. (2) 318 (1929);

U. S. v. One Kissel, 289 Fed. 120 (1923, D. C. of Ariz.);

U. S. v. Milstone, 6 Fed. (2) 481, 483 (1925, D. of C.);

and it may not be amiss to make here an

Elaboration of Above Cited Cases.

Subsequent to U. S. v. One Ford Coupe, supra:

U. S. v. One ton Wichita, 37 Fed. (2d) 617 (D. C. of N. Y., 1930).

In this case it was sought to forfeit the automobile under R. S. U. S., Section 3450, on the ground of fraudulent evasion of taxes. There was no evidence that the taxes had not been paid. The court said:

> "There is no evidence whatever as to whether there were any stamps on the containers or not—Under these circumstances, mere illegal possession is not sufficient upon which to found an inference of evasion of taxes."

In the case at bar the only commodity upon which a tax could by any possibility be said to be imposed, or imposable, was the 150 gallons of Jack Ass Brandy. There was no evidence to show that the tax had not been paid. Sheean does not testify as to whether or not the containers of the brandy bore any stamps—cancelled or otherwise. It is true that he says "It is my belief that no tax had been paid" but this is not even a mere scintilla.

U. S. v. One Dodge Coupe, 34 Fed. (2d) 943; D. C. of Mass., Oct., 1929.

In this case 20 gallons of distilled spirits were found in an automobile. *On the applicability of U. S. v. One Ford Coupe,* supra, the court said:

"In United States v. One Ford Coupe, 272 U. S. 321, 71 L. Ed. 279, it was held by a bare majority of the court and against the view which had generally prevailed in the lower courts that R. S. U. S., Sec. 3450 was not superseded in cases of this character by the National Prohibition Act. The case arose on a motion to quash the libel. No evidence was taken, *and the question what constituted sufficient proof of intent* to defraud the U. S. of such tax" (R. S. U. S., Sec. 3450), *was not considered.*"

On the question of intent the court said:

"Section 3450 *is to be considered in the light of the conditions which existed when it was passed.* At that time intoxicating liquor was heavily taxed, but it was as legal to transport it over the roads as wheat. *The present day restrictions on the movement of liquor was then unknown. The section in question was designed in aid of the tax laws,* to prohibit the removal or concealment of liquor for the purpose of evading taxation. *The intent* to which the statute refers is an *actual* intent, which enters into the act of removal or transportation; it is, as the above quotation shows, a fact to be proved.

In the present case the liquor was *outlawed property.* To disclose it to the government officers would have *exposed it not to taxation, but to immediate forfeiture.* Those transporting it undoubtedly knew that it had not been taxed; but there is no evidence that their transportation of the liquor was undertaken with any thought or

intent of thereby evading taxation. *I do not think that such an intent is inferable from the facts shown. An intent to violate the prohibition law,* which undoubtedly existed, *is not the same thing as the special intent which this statute requires. There is no occasion to extend beyond its plain and very narrow provisions this extreme section the very validity of which is so deeply open to question.*"

U. S. v. One Chevrolet, 21 Fed. (2d) 477; D. C. of Ala., Aug., 1927.

Judge Clayton, commenting on *U. S. v. One Ford Coupe,* supra, said:

> "* * * it does not seem to me that anything was definitely decided except that Judge Grubb, the District Judge, should not in that case have dismissed the libel on motion, but should have heard it on its merits."

and *on the question of proof of intent* he quotes with approval the following language of the court in *U. S. v. Milstone,* infra, viz.:

> "The failure to pay the revenue tax was a mere incident of the illegal possession and transportation. This must be so since the possession and transportation were illegal in any event, regardless of the payment or non-payment of the tax. In fact there was no way in which Jackson might have paid the tax without inviting immediate prosecution for illegal possession. *How then may it be said in reason that mere illegal transporta-*

tion constitutes a 'removal' of liquor with intent to defraud the United States of such tax within the meaning of Section 3450?"

U. S. v. Gen. Motors, 25 Fed. (2) 238; C. C. A., 5th Cir., April, 1928.

Affirms the decision of Judge Clayton, supra, and says *en passant:*

"Assuming that it is *possible to prove* that one who uses a vehicle in the removal or for the deposit or concealment of untaxpaid liquor has the necessary intent under Section 3450 to defraud the United States of a tax which *existing law neither requires nor permits to be paid",* etc.

U. S. v. One 5 ton Truck, 25 Fed. (2) 788; C. C. A., 3d Circuit, April, 1928.

An abandoned truck containing unstamped liquor was sought, to be forfeited on the ground that the liquor was possessed with intent to defraud the U. S. of the tax. *On the question of proof of intent* the court said:

"As in criminal law it (the statute) contains two elements, an act and an intent. Both must be present. When both are present and cooperate the offense is complete.

* * * * * * *

the intent therefore is the essence of the crime * * * We cannot hold that the presence of liquor in a form which in the circumstances can-

not disclose it to be tax unpaid, raises a presumption of the requisite intent in lieu of proof by competent evidence."

U. S. v. One Buick Automobile, 34 Fed. (2) 318; Aug. 3, 1929.

Here the *culprit* was the owner of the automobile which had been used in the transportation of the contraband whiskey, and *he swore* that he did not transport, possess or conceal with intent to defraud the United States of a tax, but with the intent to commit an offense against the National Prohibition Act. Held, that the intent was negatived; the court saying that ignorance is no excuse for crime *except*

"where, as in this case, specific intent is essential to a crime—and ignorance of the law negatives the existence of such intent", citing 16 C. J. 85.

In the case at bar, the truck, when seized, was not in the immediate possession of either the C. I. T. Co. (claimant) or of Belli (the purchaser—conditional—from said claimant), but of some third persons not shown to be connected in any way with C. I. T. Corp. or Belli. "The agents started to apprehend", but one got away and he apprehended the other (Bill of Exceptions, P. R. p. 12), but it does not appear what was the name of the one who "got away" nor what was the name of the one who was "apprehended". The claimant, therefore, not knowing the name of

either one of these men, was unable to place either of them on the witness stand, for the purpose of eliciting a categorical statement of his intent (as was done in the case last above cited); but nevertheless, in the case at bar there was no evidence of any intent on the part of anyone to "defraud the revenue" nor of any circumstances from which such specific intent could be inferred.

Before U. S. v. One Ford Coupe, supra:

U. S. v. One Kissel, 289 Fed. 120; D. C. Arizona, May, 1923.

Automobile sought to be forfeited under Section 3450, R. S. U. S., because it was used in concealment of unpaid-tax narcotic, with intent to defraud the U. S. of the tax.

Dooling, Judge (p. 122):

> "But it requires more to warrant the forfeiture of the automobile than the deposit or concealment of the drugs therein. *They must be so deposited or concealed with intent to defraud the United States of the tax* imposed on them, and *the burden is upon the Government to show that such was the intent.* Means, the driver of the car, was so far as appears neither importer, manufacturer, producer, or compounder of the drugs, nor connected in any way with them. His possession of the drugs was unlawful, and if he disclosed such possession for the purpose of offering to pay the tax, he would subject himself to

arrest and the drugs and automobile to seizure. His concealment of the drugs is to be attributed, in my judgment, to the fact that he knew he was engaged in an unlawful business, rather than to the fact that he was trying to evade the payment of a tax of one cent. It should be a clear case which would warrant the forfeiture of an automobile valued at $1400.00 and belonging to one not connected with the transaction for failure on the part of some one unknown to pay to the government a *one cent* tax."

U. S. v. Milstone, 6 Fed. (2d) 481, 483; D. of C., 1925 (see, supra, p. 28).

The "guilt of the truck", if any, consisted in the fact, if it be a fact, that *it was found in a certain yard or enclosure.* Which yard or enclosure? That yard or enclosure in which were found jack ass brandy and raw materials. What jack ass brandy and raw materials? That which was possessed by John Doe and Richard Roe *with* intent to evade the payment of the tax. No such brandy and raw materials has been shown to have been possessed by anyone with any such intent. The government then—not having proved that the possession of the alleged contraband was with *intent to evade* the payment of the tax—has failed to establish any case against the truck.

VI.

THE COURT ERRED IN ADJUDGING A FORFEITURE OF THE TRUCK TO HAVE BEEN INCURRED; BECAUSE THE EVIDENCE SHOWED THAT ONLY A PART OF THE TRUCK WAS WITHIN THE ENCLOSURE.

The question arose on the evidence (Bill of Exceptions, P. R. pp. 12 and 13), request for, and refusal to make Finding No. V (Bill of Exceptions p. 16) Assignment of Errors No. IV (P. R. p. 20).

Discussion.

No ground of forfeiture is alleged except that the truck was within the yard or enclosure in which the still, the raw materials and the jack ass brandy were found. Claimant went to trial to meet that charge alone; if there be evidence relating to any other cause of forfeiture, that other cause of forfeiture could not be urged at the trial or here unless the information was amended—a thing which was not done (*U. S. v. 4800 Bbls.,* F. C. 15153). If an application to amend had been made and allowed claimant would have asked for a continuance.

The government then must prove that the *truck was within* the yard or enclosure. This the government has not done. The evidence on that point was as follows,—Sheean, testifying:

> "The truck was about 50 yards from the barn (P. R. 12). The front wheels were inside and the rear wheels were outside" the yard (P. R. p. 12).

> "I would say it was just about on the line. It was part over the line and rear part outside of this particular enclosure. The gate had been opened and they were proceeding in" (P. R. p. 13).

A truck does not consist of only front wheels—it cannot be said to be within an enclosure unless all and every part, or at least the major part, is within the enclosure. If the location within the enclosure of only the front wheels be sufficient, then why would not the like location of the bumper or of a fender be sufficient? If the location of the front wheels is sufficient to constitute the truck as being *within* the enclosure, why is not the location of the rear wheels sufficient to constitute the truck as being *without* the enclosure? The law does not decree the forfeiture of a truck which is "about to enter" the enclosure—which is "attempting to enter the enclosure"—which is "partly within and partly without the enclosure". If the law requires that a certain thing be done within 10 days, is it a compliance when it is only half done within that time?

We think this is a substantial point, but even if it were the acme of technicalities a person, who knows that the government knows him to be innocent of any wrong doing, would be justified in raising the question and in relying upon it as a defense to an attempt to forfeit his property by making a strained and twisted application of a statute so unfair, so inequitable and so inapposite as is Section 3453, R. S. U. S. No good toward the protection of the Internal Revenue does

such an application of an effete statute accomplish; no good does it do the cause of prohibition.

> "Forfeitures are not favored—they must be within the *letter* and *spirit* of the law."
>
> *U. S. v. Mattio,* 17 Fed. (2d) 879.

General.

Perversion of the Statute: The Prohibition Agent says "but one got away and he apprehended the other" (P. R. 12), but it does not appear that anyone was prosecuted for violation of the National Prohibition Act or that any article except this truck (the property of innocent persons) was seized or destroyed or sought to be forfeited. Section 3453, R. S. U. S., is an old Revenue Statute enacted to aid in the collection of revenue, and for no other purpose, but in (what cannot be regarded as anything but) mistaken zeal has been unearthed and is sought to be applied as an aid to the enforcement of the eighteenth amendment—a purpose entirely alien to the purpose of its enactment. Speaking of such a perversion the U. S. District Court for the Western Division of New York, said:

> "The Department of Prohibition is *now attempting* to make seizures under this old Revenue Act. The case under discussion and a number of other cases now before me are in fact ordinary violations of the National Prohibition Law. That Act furnishes an adequate remedy and in the judgment of Congress adequate punishment for its violation. It is not necessary or desirable for the Prohibition Department *to try to operate* under an old taxing statute which, while tech-

> nically in force *was not intended to be used to enforce the Eighteenth Amendment to the Constitution.*"
>
> *In re Hurley,* 37 Fed. (2) 397.

and so, too, the case at bar has its genesis in "an ordinary violation of the National Prohibition Act". In *Richbourg Motor Co. v. U. S.* (74 L. Ed. 503: "Adv. sheets No. 13—case decided May 19, 1930) the Supreme Court declines to say "whether if for any reason the seizure cannot be made or the forfeiture proceeded with, prosecution for any offense committed must be had under the National Prohibition Act rather than other statutory provisions", but nevertheless, we think that the whole tenor of the decision is to "frown upon" the effort to pervert a Revenue Statute into an implement for the enforcement of the Volstead Act.

Considering the drastic character of Section 3453, R. S. U. S., together with what has been said, we respectfully urge that no such attempted perversion ought to be allowed to succeed if it is possible to avert such success by any fair construction of the statute or by any intendment consistent with reason and justice.

Respectfully submitted,

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